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Supreme Court, U.S.
FILED

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Docket No. _____

In The

SUPREME COURT OF THE UNITED STATES

REGINALD L. JENSEN,

Petitioner,

v.

PRUDENTIAL FINANCIAL, INC.,
A New Jersey Corporation
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
A New Jersey Corporation
PRUCO SECURITIES CORPORATION
A New Jersey Corporation
PRUDENTIAL SECURITIES INCORPORATED
A Delaware Corporation

Respondents.

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals for the Ninth Circuit

Reginald L. Jensen
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QUESTIONS FOR REVIEW

A. INVASION OF PRIVACY. Do the United States Constitution, Amendment 14; the California Constitution, Article 1, Section 1; the Freedom of Information Act; federal securities laws; state laws; and National Association of Securities Dealers rules and regulations; control access to information regarding an individual or does an individual's signature on a restricted and limited, standard, vague authorization form overcome the application of these legal provisions? *Department of Justice v. Reporters Committee*, 489 U.S. 749, 762-763, 764 n. 16 (1989).

B. VALIDITY OF AN AUTHORIZATION. Is an authorization valid in California if the maker is a New Jersey corporation using a fictitious name not in compliance with California code § 17918?

C. LIBEL. Can a court consolidate various corporations into one entity for the purpose of applying privilege in the transfer of false information? The Ninth Circuit Court of Appeals ruled that California Civil Code § 47(c) controls. However, this code applies only to communications between previous and potential employers. The Ninth Circuit has granted privilege to noninterested parties, to parties where no intention of employment existed.

D. DEFAULT. Can the Court of Appeals ignore this Court's ruling on willful default? See; *United States v. Bryan* 339 U.S. 323, 327, (1950)

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceedings below were Reginald L. Jensen, (as appellee) and respondents Prudential Financial, Inc. ("Financial"), a New Jersey Corporation; Prudential Securities Incorporated ("Securites") a New Jersey Corporation; The Prudential Insurance Company of America ("Insurance") a New Jersey Corporation; and Pruco Securities Corporation ("Pruco") a New Jersey Corporation, (as appellants).

Pursuant to Rule 29.6, petitioner Reginald L. Jensen states that he is an individual.

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OPINIONS BELOW

The District Court's order (per Fogel, J.) denying Plaintiff's motion for default judgment and granting Defendants' motion to dismiss with leave to amend on February 25, 2004, is not for citation. The District Court's order (per Fogel, J.) granting Defendants's motion to dismiss without leave to amend; and deeming moot Defendants' motion to strike on July 21, 2004, is not published and not for citation. The Ninth Circuit Court of Appeals is a memorandum opinion and is not published (per Pregerson, Canby, and Thomas).

STATEMENT OF JURISDICTION

JURISDICTION of the District Court is under 28 U.S.C.A. §1332.

JURISDICTION The Court of Appeals entered judgment on May 9, 2005, which was filed on May 13, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISION INVOLVED

28 U.S.C.A.§ 1332 based upon diversity of citizenship because the Defendants are incorporated in and have their principal places of business in states other than California and the amounts in controversy exceeds $75,000.

COUNSEL OF RECORD

Counsel of record and all parties are listed on Pet. App. #3A-5A.

STATEMENT OF THE CASE

Reginald L. Jensen, Petitioner, Pro Se, Plaintiff and Appellant below, is a life insurance agent.

There are four Defendants in this cause of action:

1. Prudential Financial, Inc. ("Financial") is a holding company;
2. The Prudential Insurance Company of America ("Insurance") is a life insurance company;
3. Prudential Securities, Incorporated ("Securities") is a stock brokerage firm;
4. Pruco Securities Corporation ("Pruco") is a stock brokerage firm.

This action filed on October 14, 2003, claims **Invasion of Privacy** against Securities and Pruco, **Libel** against Financial and Insurance, and **Oppression** against Insurance.

On November 12, 2003, only Defendant Insurance responded by filing a Motion to Dismiss. The Motion to Dismiss said the other three Defendants had not been served. Footnote 1, on page 2 of said Motion says:

> Defendant The Prudential Insurance Company of America (hereafter "Prudential" or "Defendant") is the only defendant who has been served, and accordingly, only Prudential (as herein defined) appears by this motion. Nonetheless, the arguments set forth herein are equally applicable to each of the named defendants.

On December 9, 2003, Jensen moved for a **Default Judgment** against Financial, Securities, and Pruco.

On December 10, 2003, Financial, Securities, and Pruco filed an appearance. (Pet. App. #D, 19A) Subsequently, the Motion for Default Judgment was denied by the District Court.

Thereafter, the Defendants's Motion to Dismiss was granted and Jensen was given the opportunity to amend, which he did. Jensen attempted to file an appeal of a ruling by the District Judge, but the Ninth Circuit Court of Appeals denied jurisdiction. A new Motion to Dismiss was filed by all Defendants and that Motion was granted. Jensen filed an appeal and the Ninth Circuit Court of Appeals upheld the dismissal. Jensen now files this Petition for a Writ of Certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE PETITION

In the District Court's Order (1) Denying Plaintiff's Motion for Default Judgment and (2) Granting Defendants' Motion to Dismiss with Leave to Amend, filed Feb. 25, 2004, the Court said ***"The fact that Prudential allegedly violated applicable rules is neither here nor there."*** (Emphasis supplied) (Pet. App. #D, 23A) The District Court also said in Order Granting Defendants' Motion to Dismiss Without Leave to Amend; and Deeming Moot Defendants' Motion to Strike, filed July 23, 2004, ***"the fact that Defendants may have violated applicable SEC rules (which Defendants deny) is immaterial with respect to Jensen's claim for invasion of privacy."*** (Emphasis supplied) (Pet. App. #C, 14A) The fact that all four defendants violated "applicable" rules, which are laws, is the very issue before the court. For what other purpose do the courts exist? The laws (rules) prohibit libel, oppression, and invasion of privacy. The *Rule*

of Law prohibits Defendants's and others from engaging in these and other herein cited violations of laws. It's weird and incomprehensible for a federal court to announce that violations of "applicable" rules are "neither here nor there" and "immaterial." The United States Ninth Circuit Court of Appeals upheld these violations of the "rules." Hence, this Petition for a Writ of Certiorari.

A. PRIVACY. On the issue of Privacy the Court of Appeals ruled:

> Prudential Insurance Company of America, Prudential Securities, Inc., Prudential Financial, Inc. and Pruco Securities Company ("Prudential") did not commit an unauthorized intrusion into Jensen's privacy by completing a background check prior to hiring him as a life insurance agent because Jensen authorized the background check and released Prudential from any and all liabilities, claims, or lawsuits with regard to the information obtained. *See Cramer v. Consol. Freightways, Inc.*, 209 F.3d 1122, 1130 (9th Cir. 2000) *(citing Hill v. Nat'l Collegiate Athletic Ass'n.*, 865 P.2d 633 (1994)" (Pet. App. A, 2A)

The Court of Appeals relied upon a standard authorization form prepared by Prudential Financial which was restricted and limited by Jensen and signed by Jensen as the basis for its ruling. Jensen completed and signed a standard dual **application** form prepared by Prudential Financial that was used by applicants to be appointed either as life insurance agents, stock brokers, or both. (Cmpt. #12, P.3) The **authorization** is included as part of the application

form. A portion of the authorization is cited by the District Court and is reproduced as follows:

> I hereby: Authorize Prudential and its authorized agents to investigate my background, references, characters, past employment, education, criminal or police reports, including those mandated by both public and private organizations and all public records for the purpose of confirming the information contained on this application and/or obtaining other information which may be material to my qualifications for my appointment.
>
> Release Prudential, its authorized agents and any person or entity which provides information pursuant to this authorization, from any and all liabilities, claims or lawsuits in regards to the information obtained from any and all of the above referenced sources.

(Pet. App. #C, 10A)

Below Jensen's signature the sentence reads: "**An Officer of the Firm/Agency or Broker/Dealer must sign if this is a Firm/Agency or Broker/Dealer Appointment Request.**" Above Jensen's signature in the middle of the form are the words "Broker/Dealer or Firm Agency Name:" Followed by "**NA**" inserted by Jensen. (Cmpt Ex. #12, P. 3) Jensen applied only to Insurance to be a life insurance agent. (Pet. App. #A, 2A and #C, 9A) (*See* also Motion to Dismiss filed 11/12/2003, Footnote #1, page 3) Jensen excluded the authorization from being used by a stock brokerage firm. Securities (a stock brokerage firm) obtained incorrect arrest

information from the NASD and provided that information to Insurance and Financial. (Pet. App. #C, 12A)

There is no information in the record showing Insurance or Financial authorized any agent to investigate Jensen's background. Securities and Pruco are not investigative agencies.

Securities and Pruco only hire life insurance salesmen if the applicants and employers comply with 15q (f)(2) of Title 15, United States Code, which provides:

> Every member of a national securities exchange, broker, dealer, registered transfer agent, and registered clearing agency shall require that each of its partners, directors, officers, and employees be fingerprinted and shall submit such fingerprints, or cause the same to be submitted, to the Attorney General of the United States for identification and appropriate processing. The Commission, by rule, may exempt from the provisions of this paragraph upon specified terms, conditions, and periods, any class of partners, directors, officers, or employees of such member, broker, dealer, transfer agent, or clearing agency, if the Commission finds that such action is not inconsistent with the public interest or the protection of investors. Notwithstanding any other provisions of law, in providing identification and processing functions, the Attorney General shall provide the Commission and self-regulatory organizations designated by the Commission with access to all criminal history record information.

> This section is implemented by Section 240.17f of Title 17, Code of Federal Regulations.

Prior to and during the process of employing a person to become a representative for a securities firm all parties must comply with SEC Reg §240.17f-2, the NASD fingerprint Regulation §240.17f-2, and the NASD application certification requirements. The NASD regulation is a statement that it has adopted 17f-2 of the Securities Exchange Act of 1934. (Cmpt Ex. #26) Jensen was never asked to provide and never did provide fingerprints. None of the Defendants complied with any of the above laws.

As of May 20, 1999, the Federal Bureau of Investigation (FBI) had no record of arrest or criminal conduct by Jensen. (Cmpt Ex. #18) (*See* Pet. App. #C, 13A)

Insurance did investigate Jensen's background. On or about February 18, 2002, **Insurance** conducted a criminal investigation of Jensen's background through CARCO Group, Inc. and found that Jensen had no federal criminal record. (Cmpt Ex. #18, Pp. 2-3) (*See* Pet. App. #C, 12A)

Securities and Pruco also investigated Jensen's background. On February 20, 2002, **Securities** obtained a WebCRD NASD report stating Jensen has an arrest on his record. (Pet. App. #C, 10A) Only a broker/dealer could access the NASD files in reference to Jensen. (Cmpt Ex. #25, Pp. 1-3) (*See also*: Plaintiff's Supplemental Objection to Motion to Dismiss First Amended Complaint. Pages 1-3.) The NASD certification requirement is as follows for stock brokerage firms in accessing information in reference to those not currently or formerly employed by the firm:

> If this report is being requested by a broker/dealer, and one or more of the subjects of the report are not current or former employees, then the broker/dealer must certify (by selecting "Yes" below) that the broker/dealer is considering such subject(s) for employment and have obtained and will keep on file such subject(s)'s written consent to review his/her/their CRD record for that purpose. (CRD Only)

The California law on dual employment of securities personnel California Code, Title 10. Investment. Chapter 3, Subch 2. Article 9. §260.216.16 *Dual Employment of Affiliation*, says:

> It shall constitute a "fraudulent, deceptive or manipulative act or practice," as used in Section 25216 of the Code, for any agent, officer, director, partner, managing employee or controlling person of a broker-dealer to become concurrently associated with another broker-dealer or with an issuer as an agent, officer, director, partner, managing employee or controlling person unless prior to establishing such concurrent affiliation (I) such person gives written notice to both affiliates regarding such dual relationship, (i) both affiliates consent to such concurrent affiliation, (ii) both affiliates establish appropriate procedures designed to correct any conflict of interest arising out of such relationship and to guard against violation of Sections 260.216, 260.216.3, 260.216.4,

> 260.216.7 or 260.218.4, etc. (including 17 CFR 240.15c1-6 and 15 USCA 78a).

The Court of Appeals cited *Cramer v. Consol. Freightways, Inc.* 209 F. 3d 1122, 1130 (9th Cir. 2000). In *Cramer*, the Court held that consent is normally a defense in a privacy action. And note 9 of the consent issue said that they must proceed under a general **tort** claim under the California Constitution, Article 1, Section 1. That section says:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

The District Court said "California does not recognize such a **tort**." (Pet. App. C, 13A)

Jensen did proceed under the California Constitution, Article 1, Section 1, and the common law (Am. Cmpt. P.8. L.25 – P.9. L.2) but the Court of Appeals ignored these requirements.

The Court of Appeals cited *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633 (Cal. 1994). (Pet. App. #A, 2A) In *Hill*, at 643, speaking to the California Constitution Article 1, Section 1, the California Supreme Court said:

> Emphasizing that the concerns underlying the Privacy Initiative extended to the conduct of both governmental and nongovernmental entities, the court observed: "Common experience with the ever-increasing use of computers in contemporary society confirms

> that the [Privacy Initiative] was needed and intended to safeguard individual privacy from intrusion by both private and governmental action. That common experience makes it only too evident that personal privacy is threatened by the information-gathering capabilities and activities not just of government, but of private business as well. If the right of privacy is to exist as more than a memory or a dream, the power of both public and private institutions to collect and preserve data about individual citizens must be subject to constitutional control. Any expectations of privacy would indeed be illusory if only the government's collection and retention of data were restricted." (Id., at p. 1043, 264 Cal Rptr. 194).

The United States Constitution, Amendment XIV, Section 1, also applies. Section 1 says:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Freedom of Information Act., 5 U.S.C. § 552, as amended by Public Law No. 104-231, 110 Stat. 3048. prohibits obtaining unauthorized information from the NASD. If the NASD is covered by the Freedom of Information Act (a new question) then it also applies:

> § 552. Public information; agency rules, opinions, orders, records, and proceedings (a) Each agency shall make available to the public information as follows:--
>
> (b) This section does not apply to matters that are--(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

The U. S. Supreme Court said: "(B)oth the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person." *Department of Justice v. Reporters Committee*, 489 U.S. 749 762-63, 764 n. 16 (1989). Therefore, if an individual says to one organization: "Yes, you can investigate my background." And says to another: "No! You cannot investigate my background." that prohibition stands.

B. VALIDITY OF AN AUTHORIZATION. Prudential Financial is a fictitious trade name. Prudential Financial, Inc. is a holding company. The words Prudential Financial are used on various forms and letterheads by and for different companies under the control of Prudential Financial, Inc. Prudential is a fictitious trade name used without specificity by Financial. Defendants use the term "**Prudential**" to identify **Insurance**. (See: Motion to

Dismiss filed 11/12/2003, Footnote #1. supra: page 3) During 2002 the name *Prudential Financial* had not been filed with a county in the State of California as an assumed (fictitious) business name as required by California Code § 17918. (See: Motion for Judgment by Default Against Defendants Pruco Securities Corporation, Prudential Financial and Prudential Securities Corporation, filed December 9, 2003) The authorization was provided by Prudential Financial to Jensen. (Cmpt. Ex. #12, P 2 & P 3)

California Business and Professional Code § 17918 says:

> No person transacting business under a fictitious business name contrary to the provisions of this chapter, or his assignee, may maintain any action upon or on account of any contract made, or transaction had, in the fictitious business name in any court of this state until the fictitious business name statement has been executed, filed, and published as required by this chapter. For the purposes of this section, the failure to comply with subdivision (b) of Section 17917 does not constitute transacting business contrary to the provisions of this chapter.

(Subdivision (b) of 17917 is not pertinent to this case.)

The authorization is not valid. Neither the District Court nor the Ninth Circuit Court of Appeals ruled on this law. The authorization form is a contract. A strict interpretation of the code demonstrates the authorization is not valid.

Assuming the authorization form is declared to be legally valid, the issue remains as to whether a standard form authorizing a background investigation by one entity can be

used by other entities which have been excluded by the authorization form. The Ninth Circuit Court of Appeals ruling means the authorization applies, but the specific exclusion contained in the authorization does not apply (Pet. App. #A, 2A).

C. **LIBEL** The District Court said (Pet. Add. #C, 11A-12A) "Jensen's defamation claim is based upon an email dated February 20, 2002 that apparently was sent between Prudential employees regarding the background check on Jensen. The email, which is attached to Jensen's amended complaint, was sent by **Audra Marszalek** to **Kathleen Schmanski,** with courtesy copy to **Kristine Krenz**. The subject of the email was "MORE INFO-REGINALD JENSEN," and reads in full as follows:

> Hi Kathy,
>
> The candidate has an arrest on his record which the FBI reported 8/12/83, the exact wording is "Charge: Dyer Act. Hold for USM."
>
> **Please have the candidate supply details of this arrest including the disposition.**
>
> Thanks."

(Emphasis supplied)

On the issue of libel the Ninth Circuit Court of Appeals ruled:

> The district court also properly dismissed Jensen's claim because the e-mail communication between **two** Prudential employees who were responsible for processing Jensen's application was privileged. *See* Cal. Civil Code § 47(c). In any case, the e-mail did not convey a false factual implication that Jensen was guilty of a Dyer Act violation, only that he had an arrest on his record requiring further inquiry. *See Coastal Abstract Service. Inc. v. First American Title Ins. Co.* 173 F.3d 725, 732 (9th Cir. 1999) (citing Kahn v. Bower, 284 Cal. Rptr. 244, 248 (1991) (Emphasis supplied)

First, the Complaint speaks to arrest, not guilt. The District Court reached the conclusion "Accordingly, it appears on the face of the pleadings the statement in the email was true — that is, that there was an FBI report regarding the Dyer Act charge." (Pet. App. #C, 13A) The pleadings and documents in evidence contradict this conclusion. The FBI said there was no arrest record regarding Jensen on May 20, 1999. (Cmpt Ex. #3) On 8/12/83 Jensen was in the office of an attorney in Tipton, Indiana, and was not under arrest. (Cmpt Exh.. #18)

Second, the District Court said: "As part of its background check of Jensen, Prudential accessed the website of the National Association of Securities Dealers ("NASD"). The NASD website apparently contained information that Jensen had been arrested in1983 for violation of the Dyer Act (the National Vehicle Theft Act), 18 U.S.C § 2311. Prudential asked Jensen for additional information about this arrest." (Pet. App. D, 18A, and # C, 10A) Securities

obtained the information from the NASD (Cmpt Exh #27) and then passed it on to Insurance through Financial. This action was in violation of U.S.C. Title 15, 15q, (f)(2); C.F.R. Title 17, 240.17f., Securities and Exchange Commission Regulation § 240.17f2; the NASD fingerprint regulation § 240.17f-2; 5 U.S.C § 552, as amended by Public Law No. 104-231, 110 Stat. 3048; Cal. Civ. Code § 45a (Pet. Add. #C, 12A); and Cal. Civ. Code § 47(c) (since is was the transfer of information from the NASD to Securities then to Insurance).(Pet. Add. #C, 10A, 12A and 13A)

The District Court said the arrest information was obtained from the NASD and that there were at least **three** parties involved in the E-mail. The NASD was an additional (fourth) party. (Pet. App. #C, 12A): (Emphasis supplied)

California Civil Code § 47(c) specifically applies ONLY to communications between a potential employer and a previous employer. California Civil Code §47(c) states in its entirety:

> "In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. ***This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the***

> ***employer reasonably believes is a prospective employer of the applicant.*** This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law." (Emphasis supplied)

Jensen has never been employed by and was not applying for employment with the NASD. Nor was Jensen applying for employment with either Financial or Securities or Pruco. Jensen's previous employer was MML Investors Services, Inc. (Cmpt Exh. #23, P.4) The Circuit Court of Appeals reached the conclusion that Cal. Civ. Code § 47(c) applied. (Pet. App. #A, 2A) This is a validation of the District's Court's reasoning that Prudentials's violations of "applicable rules is neither here nor there." or is "immaterial." (Pet. App. #D, 22A; and #C, 14A)

The Circuit Court of Appeals cited *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F 3d 725, 732 (9th Cir. 1999) (citing *Kahn. V. Bower*, 284 Cal. Rptr. 244, 248 (1991). (Pet. App. #A, 2A) *Coastal Abstract* refers to opinions expressed by the defendant. At 732, *Coastal Abstract* says: "[5, 6] An opinion that does not convey a false factual implication is not defamatory under California law." None of the Defendants ever claimed to be expressing an opinion about Jensen being arrested and nothing in evidence demonstrates such a conclusion. (Cmpt Ex. #s 3, 18, & 20)

Coastal Abstract simply doesn't apply here. *Kahn*, at 248, III. says: "The stated basis for the trial court's entry of judgment was its conclusion that the challenged statements "are statements of opinion and not statements of fact and therefore do not constitute actionable libel."" *Kahn* doesn't apply either.

Malice applies because Insurance knew from the Carco investigation on or about February 18, 2002, Jensen had no criminal record. (Pet. App. #C, 11A) (*See also* Cmpt Ex. #18, Pp.2-3) This is also a jury issue. In *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), an appeal from the Ninth Circuit, the U.S. Supreme Court held "the evidence presents a jury question whether Malcolm acted with requisite knowledge of falsity or reckless disregard as to the truth or falsity of five of the passages." The Court of Appeals should have sent the case back for jury trial on the issue of libel.

D. DEFAULT On the issue of Default under Fed. R. of Civ. P. 4. The Court of Appeals said:

> The district court did not abuse its discretion by denying Jensen's motion for default judgment as the record reflects that Prudential Securities, Inc., Prudential Financial, Inc., and Pruco Securities Company were not properly served with summons and complaint. *See* Fed. R. Civ. P. 4; *see Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986).

The *Eitel* citation refers to a situation whereby the Plaintiff interfered with the service. Defendants have never claimed Jensen has interfered and Jensen made no contact

with Defendants other than to effect service through a professional service firm and the United States Post Office. The professional process servers completed their work in compliance with the rules of the Court. *Eitel* doesn't apply here. Any error on Jensen's part was inconsequential and failed to interfere with Defendants's ability to timely respond. The Court Docket shows the facts of service are as follows:

A. **10/14/2003,** Civil Docket Case #: 5:03-cv-04608 filed.

B. Summons Issued as to Prudential Securities Incorporated (gm, COURT STAFF)(Entered: 10/14/2003)[1]

C. **10/14/2003** ADR SCHEDULING ORDER: Case Management Statement due by 2/17/2004, Case Management Conference set for 2/23/2004 at 10:30 AM. (gm, COURT STAFF)(Entered: 10/14/2003)

D. **11/12/2004** Certificate of Interested Entities by Prudential (sec) Insurance Company of America. (gm, COURT STAFF)(Entered: 11/14/2003)

E. **11/12/2003.** Motion to Dismiss *for failure to state a claim* filed by The Prudential Insurance Company of America. Motion Hearing set for 1/26/2004 09:00 AM. (gm, COURT STAFF)(Entered: 11/14/2003)[2]

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[1] SUMMONS IN A CIVIL CASE issued. Defendants given 20 days to respond or "judgment by default will be taken against you." (Court record)

[2] This Motion sets the defendants apart as four separate entities, not as a single unit.

F. **11/12/2003** Received Order re [4] *Motion to dismiss* by The Prudential Insurance Company of America. (gm, COURT STAFF)(Entered: 11/14/2003)

G. CERTIFICATE/PROOF OF SERVICE by The Prudential Insurance Company of America re[], [4] (gm, COURT STAFF)(Entered: 11/14/2003)

H. **12/02/2003**. "SUMMONS Returned Executed by Reginald L. Jensen, Pruco Securities Corporation. Pruco Securities Corporation served on 10/22/2003; answer due 11/12/2003; **Prudential Financial served on 10/21/2003, answer due 11/10/2003**; Prudential Securities Incorporated served on 10/22/2003, answer due 11/12/2003; The Prudential Insurance Company of America served on 10/22/2003, answer due 11/12/2003. (gm, COURT STAFF)(Filed on 12/2/2003)(Entered: 12/05/2003)" (Emphasis supplied)

I. **12/02/2003**. CERTIFICATE OF SERVICE by Reginald L. Jensen re [6] Summons Returned Executed, CORRECTED NOTIFICATION OF SERVICE OF SUMMONS ON ALL DEFENDANTS (gm, COURT STAFF) (Filed on 12/2/2003) (Entered: 12/05/2003)

J. **12/03/2003**. REQUEST for the Court Clerk to certify service of summons on all defendants as completed by Reginald L. Jensen. (gm, COURT STAFF) (Filed on 12/3/2003) (Entered: 12/05/2003)

K. **12/09/2003**. Declination to Proceed Before a U.S. Magistrate Judge by Reginald L. Jensen. (gm, COURT STAFF) (Filed on 12/9/2003) (Entered: 12/10/2003)

L. **12/09/2003**. MOTION for Default Judgment as to Defendants Pruco Securities Corp., Prudential Financial and Prudential Securities Corp. filed by Reginald L. Jensen. (gm, COURT STAFF) (Filed on 12/9/2003) (Entered 12/10/2003)

M. **12/9/2003**. Received Order re Motion for Default Judgment [10] by Reginald L. Jensen. (gm, COURT STAFF) (Filed on 12/9/2003) (Entered 12/10/2003)

N **12/10/2003**. Joinder in Motion to Dismiss [4] by Pruco Securities Corporation, Prudential Financial, Prudential Securities Incorporated, The Prudential Insurance Company of America. (gm, COURT STAFF) (Filed on 12/10/2003) (Entered: 12/12/2003)

Insurance holding companies are governed by the California Insurance Code Section 1215-1215.16

Agent for service of process is governed by the California Insurance Code. The code reads as follows:

> 1600. The commissioner shall require every foreign insurer, as a condition precedent to receiving and holding a certificate of authority, to file and maintain in the commissioner's office a writing designating an agent for service of process. The agent designated may be any person residing in this state, including, but not limited to, any corporate officer of the insurer. The writing shall state the name of the agent and his or her place of business in this state with sufficient particularity so that he or she can readily be found by peace officers or process servers. Appointment of an agent reasonably available for service of papers, notice, proof of loss, summons or other process during business

hours shall be continuously maintained by every admitted insurer subject to this article while it holds a valid and unrevoked certificate of authority.

1602. Any notice provided by law or by a policy, and any proof of loss, summons or other process may be served on such agent in any action or other legal proceeding against the insurer, and such service gives jurisdiction over the person of such insurer.

The California Corporations Code Provides:

1700. In addition to the provisions of Chapter 4 (commencing with Section 413. 10) of Title 5 of Part 2 of the Code of Civil Procedure, process may be served upon domestic corporations as provided in this chapter.

1701. Delivery by hand of a copy of any process against the corporation (a) to any natural person designated by it as agent or (b), if a corporate agent has been designated, to any person named in the latest certificate of the corporate agent filed pursuant to Section 1505 at the office of such corporate agent shall constitute valid service on the corporation.

Service was made on the authorized agent for service of process for Insurance, Securities, and Pruco, and on Financial directly. (Court Docket: 12/02/2003 through 12/10/2003)

On February 2, 2004, Elizabeth McCrohan, Vice President and Corporate Counsel of **Insurance**, and Robert Spagat, attorney for the Defendants, filed Declarations saying that to their knowledge service of process and complaint had not been made on Financial, Securities, and Pruco, as of November 12, 2003. ***Elizabeth McCrohan*** said:

> 2. On information and belief, Defendant Prudential Insurance Company of America ("PICA") was served on October 22, 2003. To my knowledge, and on information and belief, PSI and Pruco had not been served with summons and complaint as of November 12, 2003, when Defendant PICA filed its motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure (the "Motion to Dismiss"). Also, to my knowledge as of November 12, 2003, PFI had not been served with summons and complaint. (Defendants's Declaration of Elizabeth McCrohan filed 02/02/2004))

Robert Spagat said:

> 2. On November 12, 2003, Defendant PICA filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. That motion currently is set for hearing on February 23, 2004. To my knowledge, and on information and belief, PSI and Pruco had not been served with summons and complaint as of November 12, 2003, when Defendant PICA filed its motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure (the "Motion to Dismiss").

> Also, to my knowledge as of November 12, 2003, PFI had not been served with summons and complaint. PSI, PFI and Pruco did not appear and join in PICA's motion to dismiss on November 12, 2003, based on my understanding that they had not been served at that time. (Defendants's Declaration of Robert Spagat filed 02/02/2004))

Elizabeth McCrohan was not employed by Financial, Securities, or Pruco. Robert Spagat, Defendants's counsel, was not the listed Agent for Service of Process with the State of California for any of the Defendants.

Neither McCrohan nor Spagat offered any statement as to the date service was completed. *If they knew that service was not completed as if November 12, 2003, they would have known and should have stated the date service was completed.* **A person cannot swear something did not happen on or by a certain date if they did not know which date it did happen.** Their affidavits are worthless.

The Defendants's attempts at self-serving and unsupported denials of having been served cannot override the requirements of the Federal Rules of Civil Procedure 4. Nothing was ever filed by Financial, Pruco, or Securities to demonstrate they had not been timely and properly served, or to affirm the date(s) of service. (All Defendants were named individually on the face page of the complaint.) The Court of Appeals was simply wrong.

The Court of Appeals has failed to properly apply the position of the United States Supreme Court in which it found a party in default when the defaulting party announced it will not respond to the complaint. In *United States v. Bryan* 339 U.S. 323, 327, (1950) the Supreme Court said:

> "Default" is, of course, a failure to comply with the summons." "A proclaimed refusal to respond, as in this case, makes that intent plain. But it would hardly be less plain if the witness embarked on a voyage to Europe on the day before his scheduled appearance before the committee.
>
> "Of course a witness may always change his mind. A default does not mature until the return date of the subpoena, whatever the previous manifestations of intent to default. But when the Government introduced evidence in this case that respondent had been validly served with a lawful subpoena directing her to produce records within her custody and control, and that on the day set out in the subpoena she intentionally failed to comply, it made out a prima facie case of wilful default."

A Defendant can change its mind about responding before the date to answer, but not after, once the party has determined it will not answer. Defendants have filed motions, but have not filed an answer to this date.

In *Bryan* (supra) at 335. the Supreme Court went on to say "The question is no less than whether courts must put up with shifts and subterfuges in the place of truth and are powerless to put an end to trifling. They would prove themselves incapable of dealing with actualities if it were so, for there is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the

substance. "Loubriel v. United States, 9 F.2d 807, 808 (1926)."""

****

The Ninth Circuit Court of Appeals decision is inconsistent with the United States Constitution, the California Constitution, federal and state laws, and relevant decisions of this Court,

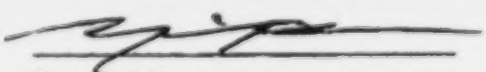
The law should apply to the facts; the facts should not be adjusted to satisfy a preferred law. There has been a rush to judgment in this case by the lower courts.

CONCLUSION

This Court should accept this Petition to correct a manifest injustice and enforce the rule of law. The integrity of the judicial system should be upheld.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,



Reginald L. Jensen
Petitioner, *Pro Se*
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San Jose, CA 95123-2260
(408) 225-4227
E-mail: regj@pacbell.net

APPENDIX

Docket No. _____

In The

SUPREME COURT OF THE UNITED STATES

REGINALD L. JENSEN,

Petitioner,

v.

PRUDENTIAL FINANCIAL, INC.,
A New Jersey Corporation
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
A New Jersey Corporation
PRUCO SECURITIES CORPORATION
A New Jersey Corporation
PRUDENTIAL SECURITIES INCORPORATED
A Delaware Corporation

Respondents.

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals for the Ninth Circuit

Reginald L. Jensen
Pro Se
5482 Walnut Blossom Drive
San Jose, CA 95123-2260
(408) 225-4227

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APPENDIX A
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-16608
MEMORANDUM*

D.C. No. CV-13-.04608-JF
Filed May 13 2005 CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Reginald L. Jensen

Plaintiff-Appellant

v.

Prudential Financial, Inc., a New Jersey Corporation; Prudential Securities, Inc., a New Jersey Corporation; Pruco Securities Corp., a New Jersey Corporation; The Prudential Ins. A New Jersey Corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California, Jeremy Fogel, District Judge, Presiding
Submitted May 9, 2005**—Decided May 13, 2005
Before: PREGERSON, CANBY, and THOMAS, Circuit Judges.

*This disposition is not appropriate for publication and my not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. *See* Fed R. App. P. 34(a)(2)

APPENDIX A
Appendix A

Reginald L. Jensen appeals pro se the district court's dismissal of this diversity action alleging defamation, "oppression, " and invasion of privacy under California law. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim, *see Brunette v. Humane Soc'y of Ventura County*, 294 F.3d 1205, 1209 (9th Cir. 2002), and we affirm.

The district court properly held that Prudential Insurance Company of America, Prudential Securities, Inc. Prudential Financial, Inc., and Pruco Securities Company ("Prudential") did not communicate an unauthorized intrusion into Jensen's privacy by completing a background check prior to hiring him as a life insurance salesman, because Jensen authorized the background check and released Prudential from any and all liabilities, claims, or lawsuits with regard to the information obtained. *See Cramer v. Consol. Freightways, Inc.*, 209 F.3d 1122, 1130 (9th Cir. 2000) (citing *Hill v. Nat'l Collegiate Athletic Ass'n.*, 865 P.2d 633 (1994).

The district court also properly dismissed Jensen's libel claim because the e-mail communication between two Prudential employees who were responsible for processing Jensen's application was privileged. *See* Cal. Civil Code § 47(c). In any case, the e-mail did not convey a false factual implication that Jensen was guilty of a Dyer Act violation, only that he had an arrest on his record requiring further inquiry. *See Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 732 (9th Circ. (1999)(citing *Kahn v. Bower*, 284 Cal. Rptr. 244, 248 (1991)).

APPENDIX A

The district court did not abuse its discretion by denying Jensen's motion for default judgment as the record reflects that Prudential Securities, Inc. Prudential Financial, Inc., and Pruco Securities Company were not properly served with the summons and complaint. *See* Fed. R. Civ. P. 4; *see Eitel v. McCool*, 782 F2d 1470, 1471 (9th Cir. 1986).

Jensen's remaining contentions lack merit.

AFFIRMED.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
June 06 2005

By: Ruben Talavera
Deputy Clerk

INTERNAL USE ONLY: Proceedings include all events.
04-16608 Jensen v. Prudential Financial, et al

REGINALD L. JENSEN Plaintiff – Appellant	Reginald L. Jensen 408/255-4227 [NTC prs] 5482 Walnut Blossom Drive San Jose, CA 95123
v.	
PRUDENTIAL FINANCIAL, a New Jersey Corporation Defendant-Appellee	Robert Spagat, Esq. FAX 421-1068 415 415/392-6320 Suite 2200 [COR LD NTC ret]

APPENDIX A

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PRUDENTIAL SECURITIES, INC., a New Jersey Corporation Defendant-Appellee	Robert Spagat, Esq. (See above) [COR LD NTC ret] Linda S. Husar (See above) [COR LD NTC ret)
Pruco Securities Corp., a New Jersey Corporation Defendant-Appellee	Robert Spagat, Esq. (See above) [COR LD NTC ret) Linda S. Husar (See above) [COR LD NTC ret)
THE PRUDENTIAL INS. a New Jersey Corporation	Robert Spagat (See above) [COR LD NTC ret]

APPENDIX A

Linda S. Husar
(See above)
[COR LD NTC ret)

APPENDIX B
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 04-16608
D.C. No. CV-13-.04608-JF

JUDGMENT

FILED
JUN 09 2005
Richard A. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

Reginald L. Jensen — *Plaintiff-Appellant*

v.

Prudential Financial, Inc., a New Jersey Corporation; ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California (San Jose).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Jose) and was duly submitted.

APPENDIX B

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered Friday, May 13, 2005

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
June 06 2005

By: Ruben Talavera
Deputy Clerk

EXHIBIT C
NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Filed
Jul 23 2004
RICHARD W. WIEKING
Clerk U.S. District Court
Northern District of California
San Jose

REGINALD L. JENSEN
Plaintiff

v.

PRUDENTIAL FINANCIAL, et al.
Defendants

Case Number C-03-4608-JF
ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITHOUT LEAVE TO AMEND; AND DEEMING MOOT DEFENDANTS' MOTION TO STRIKE
[Docket Nos. 32, 40]

Defendants' motion to dismiss the above-entitled action was argued on May 24, 2004. Plaintiff did not file a substantive opposition prior to the hearing because he had filed an appeal with respect to the Court's Order of February 25, 2004, dismissing his original complaint with leave to amend. At the hearing, the Court explained that Plaintiff's appeal did not stay the action,[1] and requested that Plaintiff file opposition on

[1] The Court of Appeals subsequently dismissed the appeal for lack of jurisdiction.

or before June 7, 2004 and that Defendants file their reply on or before June 14, 2004. The Court stated that once briefing was completed, the matter would be taken under submission without further oral argument. The matter has been fully briefed. Having carefully reviewed Plaintiff's amended complaint filed March 10, 2004 and having considered the arguments of the parties, the Court concludes that Plaintiff has failed to state a claim upon which relief may be granted and that further amendment would be futile. The Court therefore will grant Defendants' motion to dismiss without leave to amend.

On June 14, 2004, Defendants filed a motion requesting that a Settlement Stipulation and Consent Order entered in another case be stricken from the record. Defendants' motion asserts that this document was attached to Plaintiff's brief in opposition to the motion to dismiss. Plaintiff filed a response on June 16, 2004, stating that the document was provided to counsel but was not filed with the Court. The document is not attached to the opposition filed with the Court. Accordingly, Defendants' motion to strike appears to be moot.

1. BACKGROUND

Plaintiff Reginald L. Jensen ("Jensen"), proceeding *pro se*, filed this action on October 14, 2003 against Prudential Financial, Prudential Securities Inc., Pruco Securities Corporation and The Prudential Insurance Company of America (collectively "Prudential"). The action arises out of Jensen's application to be licensed as a life insurance agent for Prudential and Prudential's background check of Jensen as part of that application process. Jensen submitted two separate written applications, both dated January 22, 2002 and both of which were attached to his

original complaint. The applications are on identical forms, which provide in relevant part as follows:

> I hereby:
>
> Authorize Prudential and its authorized agents to investigate my background, references, characters, past employment, education, criminal or police reports, including those mandated by both public and private organizations and all public records for the purpose of confirming the information contained on this application and/or obtaining other information which may be material to my qualifications for my appointment.
>
> Release Prudential, its authorized agents and any person or entity which provides information pursuant to this authorization, from any and all liabilities, claims or lawsuits in regards to the information obtained from any and all of the above referenced sources.

As part of its background check of Jensen, Prudential accessed the website of the National Association of Securities Dealers ("NASD"). The NASD website apparently contained information that Jensen had been arrested in 1983 for violation of the Dyer Act (the National Vehicle Theft Act), 18 U.S.C. § 2311. Prudential asked Jensen for additional information about this arrest. Jensen explained that the information was erroneous. Jensen was

not arrested for a Dyer Act violation in 1983, although he was arrested for a Dyer Act violation in 1947. Prudential ultimately accepted Jensen's application and registered him to sell Prudential life insurance policies.

Jensen's original complaint asserted eleven claims against Prudential, three for fraud and eight for invasion of privacy. His amended complaint contains three claims: (1) defamation, (2) oppression (3) invasion of privacy.

II LEGAL STANDARD

"A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *see also Argabright v. United States*, 35 F.3d 472, 474 (9th Cir. 1994). For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Argabvright*, 35 F.3d at 474. The pleadings of *pro se* litigant is held to a less stringent standard than a pleading drafted by an attorney, and is to be afforded the benefit of any doubt. *Holmes v. Kerner*, 404 U.S. 519, 520 (1972); *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 623 (9th Cir. 1988). Further, a *pro se* litigant must be given leave to amend unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment. *Lucas v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995).

III DISCUSSION

A. Defamation.

Jensen's defamation claim is based upon an email dated February 20, 2002 that apparently was sent between

EXHIBIT C

Prudential employees regarding the background check on Jensen. The email, which is attached to Jensen's amended complaint, was sent by Audra Marszalek to Kathleen Schmanski, with courtesy copy to Kristine Krenz. The subject of the email was "MORE INFO-REGINALD JENSEN," and reads in full as follows:

> Hi Kathy,
>
> The candidate has an arrest on his record which the FBI reported 8/12/83, the exact wording is "Charge: Dyer Act. Hold for USM."
>
> Please have the candidate supply details of this arrest including the disposition.
>
> Thanks.

Jensen asserts that Audra Marszalek "had in her possession or available to her" documents indicating that Plaintiff did not have such an arrest on his record. He further assets that the statement in the email was false and defamatory and that the circulation of the statements has caused him emotional distress and damaged his personal and business reputation.

To state a claim for libel, Jensen must allege that Defendants published a statement that is false, defamatory and unprivileged. Cal. Civ. Code § 45. Moreover, unless the

statement is defamatory on its face, Jensen must demonstrate that he suffered special damages. Cal. Civ. Code § 45a. Attached to the amended complaint as Exh. 6 is a printout from the NASD stating as follows: "FBI REPORT REC'D 8/12/83. CHARGE: DYER ACT. DISPOSITION: HOLD FOR USM." Accordingly, it appears on the face of the pleading the statement in the email was true – that is, that there was an FBI report regarding the Dyer Act charge. The email does not state that Jensen was guilty of the charge, but merely reported – accurately – that the FBI had reported such a charge. A statement that such charge had been reported and an inquiry for further information is not defamatory. Moreover, the statement appears to be privileged under Cal. Civ. Code § 47(c), providing that a statement is privileged if it is made without malice to a person interested therein by one who also is interested. Section 47(c) applies to statements made in the context of an application for employment. Finally, Jensen fails to allege any facts showing that he suffered special damages. After Prudential clarified that the statement was erroneous, it granted Jensen's application and licensed him to sell its products.

It does not appear that Jensen would be able to amend his complaint to state a viable claim for defamation in light of the facts already alleged. Accordingly, the defamation claim will be dismissed without leave to amend."

B. Oppression.

California does not recognize such a tort. To the extent the allegations of oppression are intended to support a claim for punitive damages, such claim fails because Jensen has failed to allege adequately an underlying tort.

EXHIBIT C

Accordingly, this claim also will be dismissed without leave to amend.

C. Invasion of Privacy.

Jensen asserts that Defendants invaded his privacy by accessing NASD records in violation of applicable rules of the Securities and Exchange Commission. As was discussed at length in the Court's Order of February 25, 2004, the fact that Defendants may have violated applicable SEC rules (which Defendants deny) is immaterial with respect to Jensen's claim for invasion of privacy. In essence, Jensen's claim is for intrusion. Such a claim has two elements: (1) intentional intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person. *Marich v. MGM/UA Telecommunications, Inc.*, 113 Cal.App.4th 415, 421 (2003). Here, Jensen explicitly granted Prudential and its agents permission to do a background check. Under these circumstances, no reasonable person could be "highly offended" that Prudential accessed Jensen's NASD records, even assuming that such records otherwise could be considered "private matter." Moreover, even if Prudential's conduct could support a viable claim for invasion of privacy, Jensen explicitly released Prudential and its agents from "from any and all liabilities, claims or lawsuits in regards to the information" obtained during the background check. Accordingly, the invasion of privacy claim will be dismissed without leave to amend.

IV. ORDER

Defendants' motion to dismiss is granted without leave to amend as to all claims. The matter is dismissed with prejudice.

DATED: 7-21-04

EXHIBIT C

SIGNED

Jeremy Fogel

United States District Judge

EXHIBIT D
NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Filed
JUL 23 2004
RICHARD W. WIEKING
Clerk U.S. District Court
Northern District of California
San Jose

REGINALD L. JENSEN
Plaintiff

v.

PRUDENTIAL FINANCIAL, et al.
Defendants

Case Number C-03-4608-JF

JUDGMENT

The Court having issued an order dismissing the amended complaint without leave to amend and dismissing the action with prejudice,

IT IS HEREBY ORDERED that judgment be entered for Defendants.

DATED: 7-21-04

Signed
JEREMY FOGEL
United States District Judge

EXHIBIT E
NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Filed
Feb 25 2004
RICHARD W. WIEKING
Clerk U.S. District Court
Northern District of California
San Jose

REGINALD L. JENSEN
Plaintiff

v.

PRUDENTIAL FINANCIAL, et al.
Defendants

Case Number C-03-4608-JF
ORDER (1) DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AND (2) GRANTING DEFEN DANTS' MOTION TO DISMISS WITH LEAVE TO AMEND

[Docket Nos. 4, 10]

On February 23, 2004, the Court heard (1) Plaintiff's motion for default judgment against Defendants Pruco Securities Corporation, Prudential Financial and Prudential Securities Corporation and (2) the motion of all defendants to dismiss the action. The Court has considered the moving and responding papers as well as the oral arguments presented at the hearing. For reasons discussed below, the motion for

default judgment will be denied and the motion to dismiss will be granted with leave to amend.

1. BACKGROUND

Plaintiff Reginald L. Jensen ("Jensen"), proceeding *pro se*, filed this action on October 14, 2003 against Prudential Financial, Prudential Securities Inc., Pruco Securities Corp. and The Prudential Insurance Company of America (collectively "Prudential"). The action arises out of Jensen's application to be licensed as a life insurance agent for Prudential and Prudential's background check of Jensen as part of that application process. Jensen submitted two separate written applications, both dated January 22, 2002 and both attached to his complaint. The applications are on identical forms, which provide the relevant part as follows:

> I hereby:
>
> Authorize Prudential and its authorized agents to investigate my background, references, characters, past employment, education, criminal or police reports, including those mandated by both public and private organizations and all public records for the purpose of confirming the information contained on this application and/or obtaining other information which may be material to my qualifications for my appointment.
>
> Release Prudential, its authorized agents and any person or entity which provides information pursuant to this authorization, from any and all liabilities, claims or lawsuits

in regards to the information obtained from any and all of the above referenced sources.

As part of its background check of Jensen, Prudential accessed the website of the National Association of Security Dealers ("NASD"). The NASD website apparently contained information that Jensen had been arrested in 1983 for violation of the Dyer Act (the National Vehicle Theft Act, 18 U.S.C. § 2311. Prudential asked Jensen for additional information about this arrest. Jensen explained that the information was erroneous. Jensen was not arrested for a Dyer Act violation in 1983, although he was arrested for a Dyer Act violation in 1947. Prudential ultimately accepted Jensen's application and registered him to sell Prudential life insurance policies.

Jensen asserts eleven claims against Prudential: claims 1 through 3 are for misrepresentation and fraud, while claims 4 through 11 are for invasion of privacy. Prudential moves to dismiss all claims. The motion to dismiss was filed on behalf of The Prudential Insurance Company of America. Footnote 1 on page 2 of the motion states that the arguments set forth in the motion are applicable to all defendants, but that the motion was made on behalf of one defendant because the others had not been served. On December 9, 2003, Jensen filed a motion for default judgment against Pruco Securities Corporation, Prudential Financial and Prudential Securities Corporation. The next day, on December 10, 2003, these defendants filed a notice of appearance and joinder in the motion to dismiss. These defendants filed an opposition to Jensen's motion for default judgment on February 2, 2004.

II. MOTION FOR DEFAULT JUDGMENT

EXHIBIT E

The motion for default judgment as to Pruco Securities Corporation, Prudential Financial and Prudential Securities Corporation will be denied. Jensen failed to obtain a clerk's entry of default with respect to these defendants. They filed an appearance on December 10, 2003. Accordingly, default judgment is not appropriate. Moreover, even had a clerk's entry of default been obtained, it is clear that these defendants always intended to defend the action and that any delay in appearing was caused by confusion as to when service of process was effected. Under these circumstances, and absent any showing of prejudice by Jensen, the Court would be inclined to set aside any default.

III. MOTION TO DISMISS

"A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *see also Argabright v. United States*, 35 F.3d 472, 474 (9th Cir. 1994). For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Argabvright*, 35 F.3d at 474. The pleadings of *pro se* litigant is held to a less stringent standard than a pleading drafted by an attorney, and is to be afforded the benefit of any doubt. *Holmes v. Kerner*, 404 U.S. 519, 520 (1972); *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 623 (9th Cir. 1988). Further, a *pro se* litigant must be given leave to amend unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment. *Lucas v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995).

Fraud:

EXHIBIT E

The elements of a claim for intentional fraud under California law are: (1) a misrepresentation or omission, (2) knowledge of falsity (scienter), (3) intent to defraud, (4) justifiable reliance and (5) resulting damages. *Lazar v. Superior Couirt,* 12 Cal.4th 631, 638 (1996).

The bases for Jensen's fraud claims are unclear. With respect to claim 1, it appears that Prudential received a subpoena for records referencing Jensen in connection with another lawsuit in this Court, *Jensen v. Massachusetts Mutual Life Insurance Company,* Case No. C-02-4551-JF. Prudential produced the records. On January 31. 2003, a Prudential paralegal, Cheryl L. Plantersmith, sent an email (attached to the complaint in this action) to Jensen's attorney in the *Massachusetts Mutual case,* stating that the records had been sent by Airborne Express. Ms. Planter-Smith also stated as follows: "I briefly reviewed the documents and I believe you may already have most of them. It appears that the majority of the research conducted by Prudential was done on the NASD Website which basically is public information." Jensen appears to be construing this statement to be a representation by Prudential that it obtained the erroneous information regarding Jensen's arrest from the *public* portion of the NASD website. Jensen alleges that this representation was fraudulent because the information actually came from the "members only" portion of the NASD website that is not open to the general public.

Jensen's reading of Ms. Planer-Smith's email is contradicted by the plain text of the email itself, which did not make any representations as to where the arrest information came from. The email stated that "the majority of the research" on Jensen was done on the NASD website and gives Ms. Planter-Smith's opinion that this website

contains public information. Moreover, Jensen does not allege facts demonstrating that Ms. Planter-Smith had authority to speak for Prudential. Finally, Jensen does not allege facts demonstrating the elements of a claim for fraud. For example, he does not allege how he relied upon Ms. Planter-Smith's email statements or how he was injured by her statements.

Claim 2 appears to be based upon the Planter-Smith email and fails for the reasons discussed above.

Claim 3 appears to be based upon one of the documents produced by Prudential in response to the subpoena. The document in question, entitled "Available Information," lists three categories: demographics, producer licensing and appointments. The document provides the date each category was "Last Updated." Jensen contends that this document is "false and fraudulent," but does not explain how it is false, or how the other elements of a fraud claim were met by Prudential's production of the document in response to a subpoena.

Invasion Of Privacy:

Jensen does not specify whether his claims for invasion of privacy are based upon intrusion or public disclosure of private facts. A claim of intrusion has two elements: (1) intentional intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person. *Marich v. MGM/UA Telecommunications, Inc.*, 113 Cal.App.3d 118, 126 (1983).

As an initial matter, it appears that any claim for invasion of privacy are barred by the language of Jensen's applications to Prudential explicitly granting Prudential and its agents permission to do a background check and releasing

Prudential and its agents from liability arising from information obtained during such background check. Jensen argues that this language did not give Prudential the authority to search the "members only" portion of the NASD website. Jensen further argues that Prudential violated applicable rules for searching the "members only" portion of the NASD website. The language granting Prudential permission to do a background check is quite broad and clearly would encompass website searches. The fact that Prudential allegedly violated applicable rules is neither here nor there. Moreover, Jensen clearly released Prudential from any claims arising out of information obtained during his background check.

To the extent Jensen assets claims for intrusion, he does not allege how a website search constitutes intrusion into a "private place, conversation or matter," nor does he allege that a website search would be highly offensive to a reasonable person. To the extent Jensen asserts claims for public disclosure of private information, it is unclear how information contained on the NASD website – even that portion open to members – could be considered "private."

Leave To Amend

Given the exhibits attached to the complaint, containing among other things the email from Ms. Planter-Smith and Jensen's application to be licensed as a life insurance agent for Prudential, the Court has grave reservations as to whether Jensen will be able to amend his pleading to cure the defects noted above. However, because Jensen is proceeding *pro se*, and because Defendants' motions are addressed to the original complaint, the Court will afford Jensen an opportunity to amend.

IV. ORDER

EXHIBIT E

Defendants' motion to dismiss is granted with leave to amend as to all claims. Any amended pleading shall be filed and served within twenty (20) days after service of this order.

Dated 2-23-04

Signed
JEREMY FOGEL
United States District Judge